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No. 77-6219

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS BALDASAR, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

WADE LIVINGSTON
Attorney
Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether a misdemeanor conviction, valid under *Scott* v. *Illinois*, No. 77-1177 (March 5, 1979), may serve as the basis for an enhanced punishment for a subsequent offense.

INTEREST OF THE UNITED STATES

In federal district courts, an indigent defendant need not be offered appointed counsel when he is tried for a petty offense,[1] so long as he is not sentenced to

[1] A petty offense is a misdemeanor punishable by imprisonment for not more than six months or by a fine not exceeding $500, or both. 18 U.S.C. 1(3).

imprisonment on conviction (18 U.S.C. 3006A(a)); *Scott* v. *Illinois*, No. 77-1177 (March 5, 1979). Many federal statutes provide that a first offense is punishable as a petty offense, but that subsequent convictions are punishable by increased terms of imprisonment.[2] The most significant of these statutes is 8 U.S.C. 1325, which prohibits illegal entry into the United States by an alien. A second violation of Section 1325 is considered a felony and is punishable by imprisonment for not more than two years or a fine of not more than $5,000, or both. More than 13,000 petty offense cases are disposed of annually under this Section. *1977 Annual Report of the Director of the Administrative Office of the United States Courts* 175. These cases typically involve indigent aliens, unrepresented by counsel. The Immigration and Naturalization Service estimates that each year more than 500 prosecutions under Section 1325 involve subsequent illegal entries and are therefore treated as felony prosecutions. Although indigent defendants in such cases are provided with counsel, in many cases the defendants were unrepresented at the time of their first conviction. The felony prosecutions for repeat offenders under Section 1325 thus will be directly affected by the decision here.[3] In addition,

[2] *E.g.*, 15 U.S.C. 1263 (shipment of misbranded or banned hazardous substances); 25 U.S.C. 202 (inducing an Indian to purport to convey title held by the United States in trust for him).

[3] INS also informs us that the possibility of an enhanced sentence is a significant factor in plea bargaining.

the criminal justice system of the District of Columbia will be affected in much the same way as any other local system (see, *e.g.*, Pet. App. A-3 n.1).[4]

STATEMENT

Under Illinois law, petty theft is a misdemeanor, punishable by a term of less than one year's imprisonment. Ill. Rev. Stat. ch. 38, ¶ 16-1(e)(1) (1974). A second or subsequent conviction, however, is treated as a felony and is punishable by a term of between one and three years. Ill. Rev. Stat. ch. 38, § 1005-8-1(b)(5).

On November 13, 1975, petitioner was convicted of stealing a shower massage from a Montgomery Ward store. Because he had previously been convicted of petty theft,[5] petitioner was sentenced under the felony provision applicable to second and subsequent petty theft offenses. He was sentenced to a term of one to three years' imprisonment (A. 17). Petitioner was represented by counsel at the trial for his second offense, but not at the trial for his 1975 petty theft offense (A. 20).

On appeal, petitioner argued that because he had not been represented by counsel at his first trial, he should not have been subject to the enhanced penalty for his second offense. The Illinois Appellate Court

[4] Moreover, the enforcement in federal courts of state law under the Assimilative Crimes Statute, 18 U.S.C. 13, will be affected.

[5] Petitioner was sentenced to one year's probation after his first conviction.

rejected this contention and affirmed his conviction and sentence. As the court noted, petitioner conceded that his 1975 conviction was valid, since he had not been imprisoned for that offense (A. 20). The court rejected petitioner's contention that the use of a prior uncounseled theft conviction to enhance the punishment for his second conviction in effect resulted in his imprisonment for the first offense. The court held that petitioner "was sentenced to imprisonment for his second theft conviction only and not, as he suggests, sentenced again, and this time to imprisonment, for the first theft conviction" (A. 24). Petitioner then sought leave to appeal to the Illinois Supreme Court, which was denied (A. 31). This Court granted certiorari on March 19, 1979 (A. 32).

ARGUMENT

1. In *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), this Court held that a state may not constitutionally imprison an indigent defendant for a petty offense unless he has been offered appointed counsel at his trial. *Scott* v. *Illinois*, No. 77-1177 (March 5, 1979), refused to extend the holding in *Argersinger* to require an offer of counsel in all cases in which imprisonment is statutorily authorized. The Court explained (slip op. 6 (footnote omitted)):

> Even were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.

The same reasoning requires rejection of petitioner's claim that *Argersinger* should be extended to bar the consideration of counsel-less misdemeanor convictions in determining whether a defendant is a repeat offender.[6] Here, as in *Scott*, the extension would create confusion and impose substantial costs on state and federal criminal justice systems.[7]

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[6] Petitioner contends (Br. 18-24) that most courts that have considered the issue have adopted the approach he urges. But all of the opinions on which he relies were decided before *Scott*. As the Fifth Circuit recognized in *Griffin* v. *Blackburn*, 594 F.2d 1044 (1979), this Court's decision in *Scott* resolved the previous conflict of authority concerning the collateral effects of uncounseled misdemeanor convictions. "The Court's opinion [in Scott] is short, broad, and grounded in basic principles. It displays no disposition to distinguish between possible effects, uses or consequences of such convictions. The authorities it cites as being in conflict are quite disparate, factually. Logically, if a conviction is valid for purposes of imposing its own pains and penalties—the 'worst' case—it is valid for all purposes" (594 F.2d at 1046).

[7] The extent of the potential burden on the various states is suggested by the number of states with statutes providing, either generally or for specific offenses, that repeated serious traffic violations are punishable by an increased term of imprisonment.

General:

Alabama—Ala. Code tit. 32, § 5-311 (1977);
Arkansas—Ark. Stat. Ann. § 75-1004 (1957);
Delaware—Del. Code Ann. tit. 21, § 4205 (1975);

As the Chief Justice emphasized in his concurrence in *Argersinger* (407 U.S. at 42), that decision placed "a new load on courts already overburdened," since it

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Kansas—Kan. Stat. Ann. § 8-5,125 (1964);
Louisiana—La. Rev. Stat. § 32:57 (West Cum. Supp. 1979);
Mississippi—Miss. Code Ann. § 63-9-11 (1973);
New York—N.Y. Veh. & Traf. Law §§ 1800, 1801 (McKinney 1970);
Ohio—Ohio Rev. Code Ann. § 4511.99 (Page Supp. 1978);
West Virginia—W. Va. Code § 17C-18-1 (1974);
Wyoming—Wyo. Stat. Ann. § 31-5-1201 (1977).

Specific offenses:

Arizona—Ariz. Rev. Stat. § 28-692.01 (Cum. Supp. 1978) (driving while intoxicated—"DWI");
Arkansas—Ark. Stat. Ann. §§ 75-601.8, 75-1026.2 (Cum. Supp. 1977) (speeding near a school and DWI);
California—Cal. Veh. Code § 42001 (West Cum. Supp. 1979) (failure to submit to safety inspection or flight from a peace officer);
District of Columbia—D.C. Code §§ 40-605, 40-609 (1973) (reckless driving, leaving the scene of an accident, and DWI);
Idaho—Idaho Code § 49-1102 (Cum. Supp. 1978) (DWI);
Kentucky—Ky. Rev. Stat. § 189.990(9), (19) (Supp. 1978) (DWI and fleeing from an officer);
Louisiana—La. Rev. Stat. Ann. § 14:98 (West Cum. Supp. 1978) (DWI);
Maryland—Md. Transp. Code Ann. § 27-101(i) (Cum. Supp. 1978) (driving with a revoked, suspended or cancelled license, DWI, and fleeing from an officer);
Michigan—Mich. Stat. Ann. § 9.2325 (Cum. Supp. 1979) (DWI);
Missouri—Mo. Ann. Stat. § 564.440 (Vernon Supp. 1979) (DWI);
Montana—Mont. Rev. Codes Ann. §§ 32-2142, 32-2143 (1961) (DWI and reckless driving);
Nebraska—Neb. Rev. Stat. § 39-669.07 (1974) (DWI);

required a prediction before trial of whether imprisonment would be an appropriate sentence on conviction. But that prediction, the Chief Justice concluded, "is not beyond the capacity of an experienced judge, aided as he should be by the prosecuting officer" (*ibid.*). In contrast, it is likely to be impossible to predict with any hope of accuracy what the collateral consequences of a conviction will be to any particular defendant at any time in the future. Therefore, acceptance of petitioner's contention would mean that, to avoid foreclosing the use of the conviction in the future, a cautious judge would have to offer counsel whenever imprisonment was a possible collateral consequence of the conviction. That is, in effect, precisely the result rejected in *Scott*.

Nevada—Nev. Rev. Stat. § 484.379 (1977) (DWI);
New Jersey—N.J. Stat. Ann. § 39.4-50 (West Cum. Supp. (1979) (DWI);
New Mexico—N.M. Stat. Ann. §§ 66-8-102, 66-8-113 (1978) (DWI and reckless driving);
New York—N.Y. Veh. & Traf. Law § 1180(f) (McKinney Cum. Supp. 1979) (speeding);
North Carolina—N.C. Gen. Stat. § 20-179 (1978) (DWI);
North Dakota—N.D. Cent. Code § 39-08-01 (Supp. 1977) (DWI);
Pennsylvania—75 Pa. Cons. Stat. Ann. § 6503 (Purdon 1977) (driving without a license or while license is suspended or revoked, racing on a highway, fleeing an officer, driving without lights, making a false accident report);
South Carolina—S.C. Code § 56-5-2940 (1977) (DWI);
Virginia—Va. Code § 46.1-15.2 (Cum. Supp. 1978) (tampering with an odometer);
West Virginia—W. Va. Code § 17C-5-2 (Cum. Supp. 1978) (DWI).

Moreover, the confusing and costly effect here presumably would include extensive upsetting of final judgments through collateral attack, since *Argersinger* applies retroactively. *Berry* v. *Cincinnati*, 414 U.S. 29 (1973). See *Marston v. Oliver*, 485 F.2d 705 (4th Cir. 1973), cert. denied, 417 U.S. 936 (1974). Not only persons like petitioner who have been sentenced to enhanced penalties for subsequent offenses, but also persons whose parole or probation has been revoked because of counsel-less misdemeanor convictions,[8] and perhaps even those who have been convicted after trials in which their credibility was impeached by such convictions (see Fed. R. Evid. 609 (a)(2)), could claim that they have been imprisoned as a collateral consequence of their original counsel-less convictions.[9]

2. Petitioner's claim that *Argersinger* bars his sentence under the enhanced penalty provision is

[8] Even if the counsel-less conviction could not itself be used in revocation proceedings, surely the conduct on which the conviction was based could be considered (*State* v. *Harris*, 312 So. 2d 643 (La. 1975)). But when *Argersinger* is applied retroactively, the facts may be so stale that this is no longer a practical alternative.

[9] The dissent below suggests (Pet. App. A-6) that although imprisonment is "a direct result" of the uncounseled conviction in the enhanced punishment situation—and presumably in parole or probation revocation—the connection is more remote when the conviction is used for impeachment or in sentencing. Petitioner rejects this distinction (Br. 19-20 n. 11), although he correctly notes that those questions are not before this Court. We mention them only to emphasize the further confusion that would flow from acceptance of petitioner's contention.

premised on the contention that his sentence of imprisonment is based on his original uncounseled conviction (Br. 13). But the sentence of imprisonment is for his second conviction; it is not a delayed punishment for the original offense. If it were, it would be prohibited not simply by *Argersinger*, but by the Double Jeopardy Clause of the Constitution.

This Court has repeatedly rejected the claim that an enhanced penalty for a subsequent offense constitutes an additional punishment for the original offense. Here, as in *McDonald* v. *Massachusetts*, 180 U.S. 311, 312 (1901), "[t]he fundamental mistake of the [petitioner] is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished * * *. But it does no such thing. * * * The punishment is for the new crime only, but is the heavier if he is an habitual criminal." The heavier punishment for a second similar offense is justified because the repetition of the offense demonstrates that "the former punishment has been inefficacious in doing the work of reform for which it was designed." *Moore* v. *Missouri*, 159 U.S. 673, 677 (1895); accord, *Graham* v. *West Virginia*, 224 U.S. 616, 623 (1912); *Carlesi* v. *New York*, 233 U.S. 51, 57 (1914). Cf. *Pennsylvania* v. *Ashe*, 302 U.S. 51, 54-55 (1937).

The enhanced punishment statutes are properly analyzed as defining status offenses. The repeat offender is treated more severely because of his status —the collateral effect of the first offense is to place him in the category of those who, if they again vio-

late the statute, are subjected to a more severe sanction. *Mays* v. *Harris*, 523 F.2d 1258 (4th Cir. 1975). That collateral effect is similar to those noted by Mr. Justice Powell, concurring in *Argersinger* (407 U.S. at 48),[10] which the Court found insufficient to require the appointment of counsel.

Under this analysis, the question posed by this case is whether the legislative decision to treat those previously convicted of a misdemeanor more stringently than first offenders is arbitrary when the defendant was not represented by counsel at the first trial. The legislative classification is arbitrary only if the original conviction is insufficiently reliable to justify the classification.[11] But a conviction that is reliable

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[10] See also Brennan, J., dissenting in *Scott, supra*, slip op. 7-8.

[11] Petitioner claims that the decisions in *Argersinger* and *Scott* turned on the conclusion that counsel-less convictions lack the reliability necessary to justify a deprivation of liberty, and that "the absence of imprisonment on petitioner's first theft conviction adds nothing to its reliability" (Br. 17). But as *Scott* makes clear (slip op. 6), "the central premise" of *Argersinger* was not the unreliability of counsel-less decisions, but the difference to the defendant between a fine or a threat of imprisonment on the one hand, and actual imprisonment on the other. Thus, in terms of the due process analysis outlined in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), it was the weight of the first factor—"the private interest that will be affected by the official action"—rather than the second—"the risk of erroneous deprivation of such interest through the procedures used, and the probable value * * * of additional * * * safeguards"—that led to the result in *Argersinger*. See also *Parham* v. *J.L.*, No. 75-1690 (June 20, 1979), slip op. 13-27. Indeed, a different weighting of these two factors underlies Mr. Justice Powell's disagreement with the analysis of the majority in *Argersinger*. It was precisely

enough to support the imposition of punishment short of imprisonment is surely also reliable enough to establish the status of a first offender.[12] Indeed, the original misdemeanor conviction is at least as reliable in showing petitioner's need for enhanced punishment as is much of the information routinely considered in presentencing reports, or the indicators of status used in similar federal statutes.

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because he found the error-reducing factor of primary importance that Mr. Justice Powell concluded that due process requires a case-by-case evaluation of the complexity of the issues involved to determine whether appointed counsel must be provided (407 U.S. at 49-52). Cf. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 786-791 (1973). In contrast, the majority focused not on the effect of counsel on the reliability of the result in a given case, but on the impact of imprisonment on the defendant, and consequently relied on that factor in defining the cases in which counsel is constitutionally required. *Scott, supra*, slip op. 6. See Note, *Argersinger* v. *Hamlin and the Collateral Use of Prior Misdemeanor Convictions of Indigents Unrepresented by Counsel at Trial*, 35 Ohio St. L.J. 168, 173-176 (1974) (*Argersinger* cannot satisfactorily be explained as based on unreliability of uncounseled convictions).

[12] It might be argued that a conviction *invalid* under *Argersinger*, because it resulted in confinement, could not be used to establish first offender status consistently with *Burgett* v. *Texas*, 389 U.S. 109 (1967); *United States* v. *Tucker*, 404 U.S. 443 (1972); and *Loper* v. *Beto*, 405 U.S. 473 (1972). We do not believe that those cases preclude the mere recognition of an uncounseled conviction as an historical fact, or the imposition of collateral consequences on the basis of that conviction—at least in the absence of a successful challenge to it. Cf. *Lewis* v. *United States*, cert. granted, No. 78-1595 (June 18, 1979). In any event, since petitioner's original conviction was *valid*, there is no prophylactic reason to deny it effect, as there was in the *Burgett* line of cases. Cf. *Spencer* v. *Texas*, 385 U.S. 554 (1967).

For example, 18 U.S.C. App. 1202(a)(3) prohibits the possession of a firearm by any person who has been adjudged a mental incompetent. But the constitutionally acceptable risk of error in the civil commitment proceeding upon which that judgment is based is substantially higher than the acceptable risk in a criminal proceeding of any kind. *Addington* v. *Texas*, No. 77-5992 (April 30, 1979), slip op. 4-13.[13]

In short, the fact that there may be severe collateral consequences of a proceeding does not alone require that appointed counsel be provided. *Baxter* v. *Palmigiano*, 425 U.S. 308, 314-315 (1976). Nor is it unreasonable for the legislature to conclude that those previously convicted of a misdemeanor should be more severely punished on a subsequent conviction, even if the original conviction resulted from a proceeding in which the defendant was not represented by counsel. Indeed, any other result would undermine the practical effectiveness of this Court's decision in *Scott*.

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[13] Similarly, an alien who has been deported after a deportation hearing, at which he is not entitled to appointed counsel (8 U.S.C. 1252(b)(2); *Murgia-Melendrez* v. *INS*, 407 F. 2d 207, 208-209 (9th Cir. 1969)), is guilty of a felony if he illegally reenters the United States. 8 U.S.C. 1326.

A driver's license may be suspended after an administrative hearing (*Bell* v. *Burson*, 402 U.S. 535, 542-543 (1971)), and driving after one's license has been suspended may be punishable as a felony. *Mays* v. *Harris*, 523 F. 2d 1258 (4th Cir. 1975).

CONCLUSION

The judgment of the Illinois Appellate Court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

WADE LIVINGSTON
Attorney

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